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WHAT IS A TRANSFER OF TITLE?

Legal analysis may seem dry and profitless to many. What if a profit can come of it after all! In *Hudson & M. R. R. v. State* (1919, N. Y.) 125 N. E. 202, a bit of analysis saved paying a double stock transfer tax. A statute imposed a stamp tax "on all sales, or agreements to sell, or memoranda of sales of stock, and upon any and all transfers of shares . . . whether made . . . by any delivery, or by any paper or agreement . . . and whether investing the holder with the beneficial interest in or legal title to said stock, or merely with the possession or use thereof for any purpose . . ." By a voting trust agreement made in 1908 certain shares were vested in three trustees. In 1913, by a later agreement made by all parties interested, the stock was deposited in escrow, and three banks were empowered to procure the transfer to them of the stock by merely filing a copy of a resolution for that purpose with the depositary, whereupon title was to vest in the banks at once; the banks were further empowered to cause the formation of a new voting trust and to cause the

deposited stock to be transferred to the new trustees; other "broad and flexible powers" were given to the banks to carry out the new agreement by such means as might seem to them expedient. The banks never formally exercised the power to cause title to vest in themselves, but they created new trustees and ordered the depositary to deliver the certificates to these trustees. Did this transaction involve two transfers of the stock within the meaning of the tax law, or only one transfer?

It was argued for the State that there were two transfers, that the banks by their order to the depositary had caused title to vest in themselves, and that the new trustees could take title only from the empowered banks. The court rightly held that only one tax was due; the agreement of 1913 did not invest the banks "with the beneficial interest in or legal title to said stock," and the exercise of the banks' power caused a single transfer of such title from the old trustees to the new ones, the beneficial interest[1] remaining continuously in the same individuals.

What is legal title and what is a transfer thereof? Of the agreement of 1913 the court says: "Its only effect upon the ownership of or title to the stock was the creation in the managers (the banks) of the *privilege* . . . of acquiring the stock, or of the *right* to direct such other disposition of it" . . . The court says that the "right" was exercised but that the "privilege" never was. Further on, with a nicer discrimination in words, the court says: "The *power* to direct the transfer to the new trustees did exist in the managers through the agreement of 1913." But "that power was not the equivalent of a vesting in them of the legal title to the stock, nor did it necessitate such vesting."

Both the "privilege" and the "right" first mentioned included *powers* vested in the banks. If those powers do not constitute "title" or "ownership," what is lacking? We must first distinguish the operative facts from the resulting legal relations; for "title" is often used to connote both indiscriminately. Such operative facts are the acts of the parties expressing agreement and the physical documents executed thereunder, the delivery and the recording of such documents; these are sometimes described as "the title." But by "title" we usually mean something other than these. We mean that because of the foregoing operative facts certain legal relations exist. We say that one *has* the title or *possesses* title. We mean by this that he may do certain things that other persons may not do, that other persons must do and forbear to do certain things that he is not commanded to do or to forbear to do, that by his own voluntary act he can cause

[1] It is not necessary here to analyze "beneficial interest." Such an interest is also a very valuable part of entire "ownership." It, too, consists of certain limited powers, privileges, rights, and immunities.

new legal relations to exist while other persons cannot. It is of these permissions, commands, powers, and immunities that "title" or ownership" consists. The owner may consume or use or carry away his goods, without societal penalty; these are valuable privileges. The owner will receive societal assistance in preventing other persons from consuming, using, or carrying away; these are valuable rights. The owner can confer ownership, in part or in whole, upon others; these are valuable powers. The owner's rights, privileges, and powers cannot be extinguished by others; these are valuable immunities.

If this is what having title means, it can be seen that one may have part title and not the whole.[2] So it was with the banks; they had large and valuable powers, that usually pertain to an owner. In complete ownership, however, these powers are exclusive and they are accompanied by exclusive rights and privileges. It does not appear whether or not after the agreement of 1913 the old voting trustees had any rights, powers, or privileges left. In all probability they had some of these left; but they had no immunities with respect to the banks, for the banks had power to divest them of every element of title. The banks in fact exercised this power eventually and caused title to pass to new trustees. It is important for us to know just what elements of title remained in the old trustees while the banks were enjoying such extensive powers; but this is left to surmise. The existence of the powers in the banks, at any rate, did not constitute the whole of title and did not bring them within the meaning of the tax law.

There is no question that the court was correct in holding that the exercise of the banks' power did not constitute two transfers. Far from being a transfer to the banks, it was a transfer from them. It was one transfer of the two parts of title—of such part as still remained in the old trustees and also of the part held by the banks themselves. The extensive powers of the banks were no doubt extinguished by their action; and thereafter if such powers existed at all, they were in the new trustees.

Title is not a physical quantity, and on its transfer we cannot see it jump. It is neither a button nor a bit of sealing wax nor a scrap of paper. But by not having it the banks saved a pretty penny in stamps.

A. L. C.

DUE PROCESS AND INJURIES FROM TERMINATION OF FRANCHISE

The decision in *Johnson v. Lake Drummond Canal and Water Company* (1919. Va.) 99 S. E. 771, seems both unjust and unnecessary. It appears that in 1787 the Virginia legislature incorporated a canal

[2] For another recent case involving a tax on the "transfer of property," where part but not all of the title had passed, see RECENT CASE NOTES, *sub tit.* TAXATION.

company to erect a canal which should "forever after" be a public highway, free for transportation of goods and for travel on payment of the tolls imposed by the act of incorporation. In 1839 another act was passed authorizing the same company to construct an outlet from its canal to the Elizabeth river and granting it the power of eminent domain, provided, however, that the proprietors of abutting land should have free passage through the outlet.[1] Prior to the construction of the outlet these lands either bordered on or were intersected by navigable creeks or streams reaching deep water and thus giving deep water access. The building of the outlet or canal completely destroyed these creeks or streams and the proviso of the Act of 1839 was inserted in order to give abutting proprietors deep water access through the canal in place of the access which was being destroyed. Soon thereafter the outlet was completed and the privilege of passage has been used by abutting proprietors, deep water access adding greatly to the value of the lands. In 1851 a railroad was given permission by the legislature to erect drawbridges across the outlet, but so as not to hinder, obstruct or delay passage of any craft on the canal; and if any such inconvenience resulted from the construction of the road, it was to be declared a nuisance and abated by the circuit court. In 1916 the latter portion of this Act was repealed and defendant canal company, who had succeeded the original canal company, was authorized by the legislature to abandon maintenance and operation of this portion of the canal or of so much of it as it deemed desirable. The defendant canal company has now sold to the defendant railroad the privilege of crossing the outlet by a permanent fill, bridge or obstruction and the railroad proposes to cross the outlet in this manner, so as completely to shut off all passage through it at the point of crossing. The plaintiffs, abutting landowners, bring this bill for an injunction which the court dismisses on the defendants' demurrer.

After some hesitation the court admits that each landowner's right and privilege of passage constituted an easement and thus property, but it avoids constitutional objections by the argument that such right and privilege exist only so long as does the canal franchise, and that the latter may be terminated at any time by act of the legislature which originally granted it. It is also admitted that this easement was

[1] "Provided, however, that the outlet and lock, or locks, which the said company may cause to be constructed under this act, shall be free for all vessels, boats, lighters and rafts of timber the proprietors of which, reside, or own lands, upon said outlet, or Deep creek, to pass and repass, free of any charge of toll or tonnage, at all times, when it can be safe to open said lock or locks; and, if any such vessels, boats, lighters or rafts of timber, shall be detained or hindered in passing the same, through any fault or neglect of said company, their agents or servants, the said company shall be liable for all injury or damage sustained thereby, to be recovered by warrant, petition or action at law, according to the extent of damage sustained as the case may be."

undoubtedly a factor in the computation of damages in the original eminent domain proceedings; but it is said that the deduction made from the amount of damages awarded because of this easement must be taken to have been ascertained on the theory that the easement would cease with abandonment of the franchise by consent of the legislature. Obviously this is but the arbitrary rule which would follow the court's decision on the main point and is not based upon what actually may have happened. In fact it would appear to be pretty surely contrary to the view of the parties at the time of the condemnation. They must have expected the easement to be unlimited in point of time, in view of the fact that it was not in terms limited, that it was in substitution for unlimited privileges of deep water access, and that the canal itself was in terms to last forever. The court's point of view is shown in its contention that to decide for the plaintiff is to hold that the franchise cannot be relinquished even with legislative consent.

Now if it were necessary to accept the dilemma as offered by the court and hold that under the circumstances the franchise could not be abandoned without infringing the plaintiff's rights, that result would nevertheless seem much fairer than the one reached in the case. And although the court states that the case is a novel one, there would not seem to be wanting cases fairly analogous, such as those where damages are claimed and, under the better rule at least, are awarded for destruction of an abutting owner's privilege of access when a highway is abandoned.[2] The cases cited by the court[3] state only the obvious rule that a franchise may be abandoned with legislative consent without infringement of rights of members of the public in general. It is, of course, clear that the operation of a franchise may give individuals at large certain privileges, e. g. of transportation, and incidental rights, e. g. against discrimination, although such individuals would not thereby obtain rights that the franchise should not be abandoned.

[2] See cases collected and considered in RECENT CASE NOTES (1919) 28 YALE LAW JOURNAL, 606, 607, to *Morris v. Covington County* (1919, Miss.) 80 So. 337 (damages awarded for destruction of means of access by abandonment of a highway). As to the awarding of damages only, the court in the principal case at the plaintiffs' request dismisses the bill without prejudice to any possible action at law, though it expressly states that it does not believe there is any remedy at law. It would seem, moreover, that injunction and not damages is the remedy and that the canal company, having taken part of the plaintiffs' property by eminent domain, should, if it desires to destroy the remnant, be relegated to the same method.

[3] *Vought v. Columbus, etc., Ry.* (1898) 58 Oh. St. 123, 50 N. E. 442; (1900) 176 U. S. 481, 20 Sup. Ct. 398, 44 L. ed. 554; *Walsh v. Columbus, Hocking & A. R. R.* (1900) 176 U. S. 469, 20 Sup. Ct. 393, 44 L. ed. 549; *Chase v. Sutton Mfg. Co.* (1849, Mass.) 4 Cush. 152; *Fredericks v. Penn Canal Co.* (1885) 109 Pa. 50, 2 Atl. 48; *Saylor v. Penn Canal Co.* (1897) 183 Pa. 167, 38 Atl. 598, 63 Am. St. Rep. 749. As to a change of use, see note 7, *infra*.

The situation would be vastly otherwise, however, in the case of obligations assumed by the franchise owner in favor of certain definite individuals.[4] Would the Virginia court say that a street railway company, for example, might repudiate its debts upon obtaining consent to abandon its franchise? If so, there may still be a ray of hope for trolley investors. Surely a disinclination to hold the canal company responsible for the maintenance of the canal is too small a basis upon which to find a limitation of the plaintiffs' rights.

But the case does not call for a decision on this point. It does not deal with a claimed duty upon the part of the canal company to continue the canal, but with the canal company's claimed power to sell out to the railroad a privilege of active obstruction. The plaintiffs are not asking for affirmative action from the defendants, but only that the defendants' affirmative acts of obstruction be enjoined. Although the plaintiffs' petition clearly points this out,[5] the court utterly fails to observe the distinction. It is submitted that a judgment for the plaintiffs would follow a recognition of this distinction through the application of either one of two well settled legal principles: (1) that one who has an easement may sue for its obstruction, though in the absence of agreement he himself must keep in repair the physical objects necessary to its exercise;[6] and (2) that where originally only an easement in land is condemned for public purposes, the owner upon the abandonment of the public use holds the land as before the condemnation.[7] The court adverts to neither of these principles, but does state that the servient tenement to the easement of each landowner is the

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[4] Cases which seem more apposite than those cited by the court are those of leases of the surplus water not needed for canal purposes, where it is held that the implied covenant to the lessee of quiet enjoyment does not prevent an abandonment of the franchise with legislative consent. *Hoagland v. New York, etc., R. R.* (1887) 111 Ind. 443, 12 N. E. 83, 13 N. E. 572; *Fox v. Cincinnati* (1881) 104 U. S. 783. But the analogy is only apparent. It does not seem improper to draw the inference, where the parties are freely contracting with each other, that they contemplate the lease to end with the franchise. Moreover, the lessee cannot be so very greatly harmed since his obligation to pay rent must cease at the same time.

[5] Par. 18 of the petition to the effect that even if the canal company might be permitted to suspend operation of the canal, it "had no right . . . to authorize said N. & W. Ry. Company to destroy the navigation of the same by your orators."

[6] This principle is so obvious that cases are not cited. That the owner of the easement must make his own repairs has long been settled. See *Taylor v. Whitehead* (1781, K. B.) 2 Doug. 745.

[7] *Vought v. Columbus, etc., Ry., supra; Whitney v. State* (1881) 96 N. Y. 240, 248. It has been held that by legislative consent one easement of a public nature may be substituted for another, as a railroad may be substituted for a canal, but *only upon paying for the additional damage caused. Hatch v. Cincinnati, etc.* (1868) 18 Oh. St. 92, 122. Even this has been denied. *Pittsburgh, etc., Co. v. Bruce* (1882) 102 Pa. 23, 28. See 9 C. J. 1151.

franchise and also that the canal company obtained the fee of the land through which the canal flowed.

Considering these holdings *seriatim,* while the court cites authority for its holding that a franchise may be the servient tenement to an easement,[8] it would seem that this involves a confusion of thought. For the servient tenement is the *physical object* concerning which the easement owner has *legal relations* with members of the public in general, while a franchise is itself an aggregate of *legal relations* of the same general nature as the easement.[9] But this point may be waived since it is clear that what the court's holding really amounts to is that the easement can last only as long as the franchise. Why this holding? The court's answer is quite involved, but seems to be this. The "right" of passage is created by the commonwealth as an incident to the grant of the franchise. The land itself is acquired in fee by the canal company either through condemnation or purchase and hence is a grant from the individuals, to which the commonwealth is not a party. The right can only be attached to the commonwealth's own creation, viz., to the franchise. Hence it ends with the ending of the franchise. This is a manifest *non sequitur.* The commonwealth has made the building of the canal and the exercise of the power of eminent domain expressly subject to the proviso of giving the right and privilege of passage. The canal company need not have accepted the authorization in view of this proviso. As it did accept, the proviso must necessarily enter into and form a part of the agreement between the company and each landowner whose land was taken under the company's power.[10] And the proviso is more than a mere agreement; it has all the essentials of an easement giving *in rem* rights against people in general.[11] It seems clear that the easement exists inde-

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[8] Washburn, *Easements and Servitudes* (4th ed. 1885) 7, 9, 10, 22, and 2 Minor, *Institutes* (3d ed. 1879) 5 are cited.

[9] For discussion of the nature of a franchise see (1919) 28 YALE LAW JOURNAL, 485; of the nature of an easement, see (1917) 27 *ibid.,* 66, and (1919) 29 *ibid.,* 218. In this case is not the land with the canal running through it the servient tenement?

[10] This would surely follow if the land was acquired by eminent domain, and as the parties undoubtedly contracted in view of the express provisions of the statute, it would seem to follow equally if the land was acquired by grant. The plaintiffs' petition does not disclose which method was ultimately employed.

[11] Even though the term "property" is used in distinction to the term "contract" the interest here created fulfills all the requirements of "property." As the writer has elsewhere suggested (1919) 29 YALE LAW JOURNAL, 94, note 16, this restricted use of the term property is not in accordance with ordinary usage, which would include contract obligations as property. In general terms property means anything which *may have* economic value. *Cf. Slaughterhouse Cases* (1873, U. S.) 16 Wall. 36, 127: "Property is everything which has an exchangeable value." Hence one party to every legal relation would have property. The person having the property would ordinarily be the one who has

pendently of the franchise and that its duration depends on ordinary principles, namely, that the intent of the parties at the time of its creation shall determine its duration. As suggested above, this intent was pretty surely that it should be unlimited, especially in view of the fact that it was substituted for unlimited rights and privileges of deep water access.

On the other point the court merely states that the canal company acquired a fee simple. It is clear in any event that it was not an unencumbered fee simple. Comparing the position of the landowners before and after the acquisition of the property by the canal company, it would appear that *before* such acquisition the landowners possessed the various rights and privileges which go to make up ownership including those of deep water access, while *after* such acquisition though a part of these rights and privileges had ceased there nevertheless existed the rights and privileges of deep water access. True these rights and privileges were not strictly the same as those previously existing, since they were to be exercised in a slightly different manner, but they are sufficiently analogous to make the situation more closely identical with the taking of only a part of one's property in land, than with a taking of the entire property. Hence there would be a situation calling for the application of the rule previously referred to that the property still remaining in the original owners is not destroyed by the abandonment of the public use.

It may therefore be debatable whether under the proviso in question it was intended that the canal company should be under a duty to keep the passageway in repair. But in view of the express wording of the proviso it hardly seems debatable that the company and its grantee are under a duty not to obstruct the passageway or cause it to be obstructed.[12] One may hope, therefore, that the case will reach the United States Supreme Court.

C. E. C.

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the affirmative (right, privilege, power or immunity) end of the legal relation, though liabilities or duties, for example, may sometimes be desirable and hence exchangeable. In this view property would also include rights and privileges ordinarily termed "personal," e. g. the right to personal liberty, the right to personal security. This would seem accurate. What Esau sold Jacob for a mess of pottage—his "birthright"—was something more than a right of inheritance. It seems to have included, among other things, the privilege of sitting first at the table. 43 Genesis, 33. So the spectacle of prize fighters relinquishing the right of personal security for money is common. The result is that property is too general a term for use in careful analysis where avoidable. Hence the ancient dogma criticised in (1920) 29 YALE LAW JOURNAL, 344, that "equity protects only property rights" is, when analyzed, unobjectionable but meaningless.

[12] Note particularly the latter part of the proviso quoted above in note 1, *supra*.

DO CONSTITUTIONAL LIMITATIONS CONTROL REFORMERS?

Mr. Justice Holmes, who loves a legal paradox, has said that notwithstanding constitutional limitations the police power might be exercised "in aid of what is held by strong and preponderant opinion to be greatly and immediately necessary to the public welfare."[1]

Recent decisions of the Supreme Court have applied this generalization to war time prohibition and have settled in advance many questions relating to constitutional prohibition. One question, however, which has not been directly answered because it has not been asked, is whether the National Prohibition Act, in so far as it prohibits the sale and possession of intoxicating liquor, applies to stocks of liquor on hand before the Eighteenth Amendment was adopted.

Theoretically this should depend upon the answer to one, or both, of two questions: Is the power of the United States in the premises subject to constitutional limitations? And if so, is the absolute, or practically absolute, prohibition against the sale and possession of liquor in the hands of one who became its owner while it was still a lawful article of merchandise a deprivation of his property without due process of law?

If the Fifth Amendment applies, the first question is answered in the affirmative. But if it be suggested that the Eighteenth Amendment is on its face a new and unlimited grant of police power, one may still ask where the power came from. The several states do not possess, and cannot grant, unlimited police powers. Most of them are forbidden by their own constitutions to take away property without due process of law, and all of them are forbidden to do so by the Fourteenth Amendment. It might be said that an amendment proposed by a constitutional convention or adopted by state conventions was a grant of power directly from the people; but an amendment proposed by a constitutionally restrained Congress, and adopted by constitutionally restrained state legislatures, would seem to be congenitally limited so far as individual property rights are concerned.

The relevant judicial history of the second question may be outlined as follows: In 1856 the New York Court of Appeals held that a statute prohibiting the sale of liquor was unconstitutional, in so far as it operated on property in intoxicating liquor existing when the Act took effect.[2]

In 1873 an attempt was made to bring the same question before the Supreme Court, but the plaintiff in error had failed to make his plea specific, and the point was dismissed with the following comment:

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[1] *Noble State Bank v. Haskell* (1910) 219 U. S. 104, 111, 31 Sup. Ct. 186, 188.

[2] "The right of sale is of the very essence of property in any article of merchandise; it is its chief characteristic; take away its vendible character and the article is practically destroyed." *Wymehamer v. People* (1856) 13 N. Y. 378, 456. *Cf.* also (1918) 27 YALE LAW JOURNAL, 393.

"But if it were true, and it was fairly presented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey, at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquors, then we concede that two very grave questions would arise, namely: 1. Whether this would be a statute depriving him of his property without due process of law; and secondly, whether if it were so, it would be so far a violation of the Fourteenth Amendment in that regard as would call for judicial action by this court. Both of these questions whenever they may be presented to us are of an importance to require the most careful and most serious consideration."[3]

In *Beer Company v. Massachusetts,* the court said:[4]

"We do not mean to say that property actually in existence, and in which the right of the owner has been vested, may be taken for the public good, without due compensation. But we infer that the liquor in this case, as in the case of *Bartemeyer v. Iowa,* 18 Wall. 129, was not in existence when the liquor law of Massachusetts was passed."

In *Eberle v. Michigan,* the point was again pressed and again left undecided.

"It was further contended that the act takes property without due process of law because it made no provision for the sale of liquor on hand at the time the law became operative. But the record does not call for a decision of that question, nor does it bring the case within the principle, suggested in *Bartemeyer v. Iowa,* 18 Wall. 129, 133, that a statute absolutely prohibiting the sale of property in existence at the time of the passage of the law would amount to confiscation and be void as depriving the owner of his property without due process of law."[5]

In *Barbour v. Georgia,* the plaintiff in error had acquired the liquor in question after the Georgia prohibition act was enacted, but before it became operative, and the court held that he took it with full notice of its infirmity and with knowledge that after a day certain his right to possess it would cease; but the court observes that,

"Whether the prohibition of sale may be constitutionally applied to liquor acquired before the enactment of the statute was raised in *Bartemeyer v. Iowa,* 18 Wall. 129, and *Beer Company v. Massachusetts,* 97 U. S. 25, 32-33; but was not decided."[6]

Finally the question was brought squarely before the court in *Hamilton v. Kentucky Distilleries Company* (Dec. 15, 1919) U. S. Sup. Ct. Oct. Term, No. 589, where the constitutionality of the War Time Prohibition Act was attacked on the ground, among others, that

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[3] *Bartemeyer v. Iowa* (1873, U. S.) 18 Wall. 129, 133.
[4] (1877) 97 U. S. 25, 32.
[5] (1914) 232 U. S. 700, 706, 34 Sup. Ct. 464, 466.
[6] (1919) 249 U. S. 454, 459, 39 Sup. Ct. 316.

it violated the Fifth Amendment by prohibiting the sale, for beverage purposes, of—"any distilled spirits," including spirits on hand before its enactment. The Act did not take effect until July 1st, 1919; and the Court said:

"But no reason appears why a state statute, which postpones its effective date long enough to enable those engaged in the business to dispose of stocks on hand at the date of its enactment, should be obnoxious to the Fourteenth Amendment, or why such a federal law should be obnoxious to the Fifth Amendment. We cannot say that seven months and nine days was not a reasonable time within which to dispose of all liquors in bonded warehouses on November 21, 1918."

It may be surmised from this ruling that the Court will also hold that the sale of liquor on hand before the adoption of the Eighteenth Amendment may be constitutionally prohibited by the National Prohibition Act; unless, indeed, it takes a shorter cut to the same result by holding that the Eighteenth Amendment grants unlimited police power to the United States in respect to intoxicating liquor.

Yet it is interesting, from an academic standpoint, to pursue the subject a little further; especially so, because this part of the opinion is not reasoned, but based on the following statement:

"The uncompensated restriction on the disposition of liquors imposed by the act is of a nature far less severe than the restrictions upon the use of property, acquired before the enactment of the prohibition law which were held to be permissible under the Fourteenth Amendment."

Mugler v. Kansas[7] and *Kidd v. Pearson*[8] were cited in support.

It is submitted that the analogy is imperfect. Restrictive regulations, however severe, on the use or sale of existing property, may be and are upheld on the ground that they do not amount to a deprivation of property.

The *Mugler* case went far, but the plaintiff in error still retained the privilege of using his brewery, except for the forbidden purpose,[9] and the right to sell it.

On the other hand, an absolute, or practically absolute prohibition against selling existing property after a day certain, amounts to a total extinguishment of one of the essential rights of ownership when that day arrives. And it is no answer to say that the owner was given a reasonable opportunity to sell, for, if it be his property, he has as good a "right" to keep it as to sell it.

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[7] (1887) 123 U. S. 623, 8 Sup. Ct. 273.

[8] (1888) 128 U. S. 1, 9 Sup. Ct. 6.

[9] It does not appear in the statement of facts that Mugler was fined for selling beer made before the Kansas statute went into effect, but that fact is not noticed in the reported arguments or in the opinion, the relevant parts of which deal only with the restriction on the use of the brewery, resulting in loss of value.

A law which requires the owner of property to sell it before a day certain or not to sell it at all, compels him to choose whether he will be absolutely deprived of his privilege of selling it, or will relinquish under compulsion of law his privilege of keeping it.

The distinction, which Mr. Justice Brandeis obliterates by a descriptive phrase, between forbidding the future manufacture of liquor or the sale of liquor thereafter made, and forbidding the sale of existing stocks of liquors, was fully recognized in *Beer Company v. Massachusetts,* and *Eberle v. Michigan,* and by Mr. Justice Brandeis himself in *Barbour v. Georgia.*

Liquor lawfully made and acquired was property when the War Time Prohibition Act was passed; and the privilege of selling it was one of the essential attributes of ownership.

No doubt any property which becomes dangerous to the public welfare may be destroyed without compensation; but it is submitted that existing property which has not changed cannot be converted into a public nuisance by a mere legislative declaration; unless, indeed, constitutional limitations do not control reformers.

Since the above comment was written the Supreme Court has pursued the reasoning, or the state of mind, of the *Kentucky Distilleries* case to its necessary conclusion. If an absolute prohibition against the sale of merchandise is, as that opinion declares, merely a limitation on its use, then there is no necessity for postponing the effective date of the prohibition in order to give the owner a reasonable opportunity to dispose of stocks on hand.

It is so held by a divided court in *Ruppert v. Caffey* (Jan. 5, 1920) U. S. Sup. Ct. Oct. Term 1919, No. 603. The point decided, as described in the dissenting opinion is, that Congress had power "directly and instantly to prohibit the sale of a non-intoxicating beverage, theretofore lawfully produced, and which until then could have been lawfully vended, without making any provision for compensation to the owner."

The prevailing opinion, persisting in the unreasoned assumption of the *Kentucky Distilleries* case, states the same result thus: "Here, as in *Hamilton v. Kentucky Distilleries Company, supra, there was no appropriation of private property, but merely a lessening of value* due to a permissible restriction imposed upon its use."

What will the Court say to the National Prohibition Act, which prohibits possession as well as sale? Is that also merely a permissible restriction on the use of property lawfully owned when the Act was passed?

J. K. B.

WHEN SILENCE GIVES CONSENT

In general, the courts have held that the maxim "silence gives consent" is not a part of the law of contract. Thus where an offer was made by an oral request to renew certain insurance policies, the request being a part of a conversation on other subjects, it was held that the mere silence of the insurance agent was no acceptance, even though the offeror so understood it.[1] There was no evidence that the agent heard the request. The court said: "Instead of silence being evidence of an agreement to do the thing requested, it is evidence, either that the question was not heard, or that it was not intended to comply with the request."[2]

It has been held that silence will not operate as the acceptance of an offer even though the offeror expressly states that it shall so operate.[3] This rule is not at all objectionable in cases where the offeree remained silent with no intent to accept and where the circumstances did not make such conduct unreasonable. It may well be criticised, however, when the offeree took the offeror at his word, intentionally used the specified mode of acceptance, and now tries to hold the offeror to a contract.[4]

In the case of *Cole-McIntyre-Norfleet Co. v. Holloway* (1919, Tenn.)214 S. W. 817, it was held that silence for an unreasonable time operated as an acceptance of an offer. On March 26, 1917, the Company's traveling salesman solicited and received a written order for 50 barrels of meal at Holloway's country store, the order expressly stating that the salesman had no power to make a contract and that the order should not be binding until accepted by the seller at its own office. The meal was to be ordered out by the buyer by July 31, or storage was to be charged thereafter. From the court's statement it may be presumed that this order was received by the seller, but it said and did nothing in consequence thereof until two months later when

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[1] *Royal Insurance Co. v. Beatty* (1888) 119 Pa. 6, 12 Atl. 607. To the same effect see *Rutledge v. Greenwood* (1806, S. C.) 2 Desaus. 389; *Carnahan Mfg. Co. v. Beebe Co.* (1916) 80 Ore. 124, 156 Pac. 584; *Grice v. Noble* (1886) 59 Mich. 515, 26 N. W. 688; *Raysor v. Berkeley Co.* (1886) 26 S. C. 610, 2 S. E. 119.

[2] *Royal Insurance Co. v. Beatty, supra,* 10. In *Titcomb v. United States* (1878) 14 Ct. Cl. 263, the claimant proposed an important modification in an existing contract. The court said: "the law does not readily infer that the defendants intended to assent from their mere silence. It was not incumbent on the agents of the government to speak when these proposed changes were requested. Silence was more compatible with the presumption that they refused to yield to claimant's solicitation than that they voluntarily assented."

[3] *Prescott v. Jones* (1898) 69 N. H. 305, 41 Atl. 352; *Felthouse v. Bindley* (1862) 11 C. B. (N. S.) 868. The latter case can easily be distinguished, however.

[4] See *Offer and Acceptance and Some of the Resulting Legal Relations* (1917) 26 YALE LAW JOURNAL, 200.

the buyer asked for the meal to be shipped. At that time it notified him that the order was rejected. War had been declared in the meantime and prices had risen. The seller might easily have notified the buyer earlier of its rejection and the buyer might as easily have made earlier inquiry. It was held that the seller's delay in informing the buyer was unreasonable and that it operated as an acceptance of the order.

It is doubtful whether the decision should be approved, admitting the case to be close to the border line. Although the court says that the company had a "duty to speak," it is clear that there was no such duty in the sense that damages could be collected for not fulfilling it. It may have been unreasonable and unfair not to speak, however, thus justifying the court in holding that failure to speak would operate as acceptance.[5]

It has been so held in several classes of cases, under somewhat different circumstances. Thus, where the offeree has received benefits at the hands of the offeror, knowing that the latter expected pay, and has himself done some act necessary to the enjoyment of the benefits, this act plus his failure to reject are held to be an acceptance. It is on this principle that persons who receive and read periodicals for which they have not subscribed are sometimes held bound to pay the subscription price.[6]

Where the offeree has received goods offered for sale on certain terms, the goods having been sent at his request or because of some previous dealings making it reasonable to send them, his retention of the goods and his failure to notify the offeror of his rejection operate as acceptance.[7] This rule has been followed in some cases, in spite of the fact that the offeror specified a particular mode of acceptance and this mode was not used.[8]

Silence by an offeree, plus the receipt of benefits conferred by the offeror, may operate as an acceptance and a promise, even though the offeree has himself done no operative or evidential act. There need be no request for such benefits, but the offeree must know or have

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[5] "Assent may be by acts as well as words, and by silence, where a party is fairly bound to speak if he dissents, as well as by speech itself." *Preston v. Amer. Linen Co.* (1876) 119 Mass. 400.

[6] *Austin v. Burge* (1911) 156 Mo. App. 286, 137 S. W. 618 (subscriber ordered paper stopped, but he continued to read it when it came); *Fogg v. Portsmouth Atheneum* (1862) 44 N. H. 115 (same, with several express repudiations of liability).

[7] *Hobbs v. Massasoit Whip Co.* (1893) 158 Mass. 194, 33 N. E. 495; *Place v. McIlvain* (1868) 38 N. Y. 96. See also *Batcheller v. Whittier* (1910) 12 Cal. App. 262, 107 Pac. 141 (services rendered as attorney).

[8] *Wheeler v. Klaholt* (1901) 178 Mass. 141, 59 N. E. 756; *Evans Piano Co. v. Tully* (1917) 116 Miss. 267, 76 So. 833. In these cases one mode of acceptance was specified and the only specified alternative was rejection. See adverse comment in (1918) 27 YALE LAW JOURNAL, 561.

reason to know that the benefits are being offered to him with the expectation of pay and under circumstances such that it would be easy to reject the benefits.[9]

If an acceptance is too late to be operative as such, but is not so late as to be quite beyond the realm of reasonable doubt, there is some authority that the ensuing silence of the offeror will operate to complete the contract.[10]

All of the foregoing cases can be distinguished from the instant case. In it there has been no enjoyment of benefits by the offeree, there has been no wrongful retention of goods sent, and it is not a case of a late acceptance silently acquiesced in. If silence is to operate as acceptance here it must be chiefly because of the one fact that the seller itself solicited the order through its salesman and specified its terms. This particular fact has been considered in a rather large class of cases. Where an application has been made for an insurance policy, accompanied by the premium, it has been intimated that unreasonable delay in considering the application may operate as an acceptance if the application is one that would have been accepted had it been considered.[11] The general rule, however, is that such delay is in itself no acceptance.[12] These cases are like the principal case in that the agents of the company solicit the application, and it is expressly provided that there is to be no contract until acceptance at the home

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[9] In *Day v. Caton* (1876) 119 Mass. 513, the defendant was compelled to pay for a party wall. The court said: "The maxim, *Qui tacet consentire videtur,* is to be construed indeed as applying only to those cases where the circumstances are such that a party is fairly called upon either to deny or admit his liability. But if silence may be interpreted as assent where a proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak." In *Taylor v. Dexter Engine Co.* (1888) 146 Mass. 613, 16 N. E. 462, the defendant's engine was in the plaintiff's basement, having been lawfully placed there by a tenant who has since vacated. The plaintiff notified the defendant that if the engine were not removed by a certain day there would be a fixed charge per day. The defendant failed to remove the engine for some days. The court held the defendant bound to pay (the exact amount not appearing). In these two cases the duty enforced might be regarded as quasi-contractual, but the court seems not to have so regarded it.

[10] See *Phillips v. Moor* (1880) 71 Me. 78; *Morrell v. Studd* [1913] 2 Ch. 648 (In both of these cases there was evidence other than mere silence that the offeror assented to the belated acceptance). This rule is adopted in the German Civ. Code, sec. 149; Jap. Civ. Code, Art. 522; and in Swiss Code Oblig, sec. 5, in case the acceptance was started on time but was delayed thereafter. *Contra: Maclay v. Harvey* (1878) 90 Ill. 525; *Ferrier v. Storer* (1884) 63 Iowa, 484, 19 N. W. 288.

[11] *Dorman v. Connecticut F. I. Co.* (1914) 41 Okla. 509, 139 Pac. 262; *Northwestern Mut. L. I. Co. v. Neafus* (1911) 145 Ky. 563, 140 S. W. 1026. In both cases, however, it was held that there was no contract.

[12] *Alabama G. L. Ins. Co. v. Mayes* (1878) 61 Ala. 163; *Misselhorn v. Mutual etc. Ass'n* (1887, C. C. E. D. Mo.) 30 Fed. 545; *Van Arsdale v. Young* (1908) 21 Okla. 151, 95 Pac. 778.

office. In such cases, however, the company still has important matters of policy to pass upon, and both parties anticipate that acceptance is to be indicated in one particular mode—by the execution and delivery of a formal insurance policy.

One other class of cases deserves passing mention. Where an unsettled running account exists between two persons, if one sends to the other a statement of the account it is generally held that retention of this by the other party without any expressed objection will render the amount an account stated.[13] It seems, however, that silence here operates rather as an evidential than an operative fact. It is a rebuttable admission against interest, not the conclusive acceptance of an offer.[14]

At the very best, the decision of the Tennessee court must be regarded as of doubtful correctness. The acceptance of an offer may consist of a mere forbearance to act, if such forbearance is definitely specified as the consideration as well as the mode of acceptance;[15] but in this case it was not so specified and silence was not the desired consideration. The offer was to make a bilateral contract and a return promise was necessary. The court leaves to mere inference even the fact that the order ever reached the offeree. No entry of the order in its books or other overt act in its own office is alleged. There is nothing other than continued silence to show that the offeree intended to accept, and nothing to show that the offeror was misled by the silence. The offeror suffered no loss other than the disappointment due to the failure to accept his order.[16]

On the petition for a rehearing the court suggests that the parties had had previous dealings with each other. There is nothing to indicate the form of these previous dealings. If the plaintiff should establish that these two parties had previously acted as if silence were an acceptance and had always sent a notice in case of rejection, or if he should establish that such was the general custom of business men in the community, the court would be justified in holding that a contract was made. But, in the absence of such a showing, it is believed that silence alone is hardly sufficient evidence of the offeree's actual assent and there is hardly sufficient reason to hold him bound by estoppel.

A. L. C.

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[13] See notes in 29 L. R. A. (N.S.) 335, L. R. A. 1917C 448.

[14] See *Wiggins v. Burkham* (1869, U. S.) 10 Wall. 129; *State v. Illinois Cent. R. R.* (1910) 246 Ill. 188, 241, 92 N. E. 814; *Dodge v. Brown* (1914) 74 W. Va. 466, 82 S. E. 262.

[15] See *Strong v. Sheffield* (1895) 144 N. Y. 392, 39 N. E. 330; *Miles v. New Zealand Alford Est. Co.* (1886) 32 Ch. D. 266 (Bowen's opinion); and other cases dealing with forbearance as a consideration.

[16] The court suggests that the goods ordered were perishable, but this is wholly misleading. If any goods were perishing because of the offeree's silence and delay they were the offeree's own goods, not the offeror's.

TREATY-MAKING POWER AS SUPPORT FOR FEDERAL LEGISLATION

The efficacy of the treaty-making power to sustain federal legislation otherwise unconstitutional has again been strikingly illustrated by the recent history of the Migratory Bird Act.

On March 4, 1913, Congress included in the Agricultural Department Appropriation Act[1] the provisions of the so-called Weeks-McLean Migratory Bird Act declaring certain migratory birds "within the custody and protection of the government of the United States," prohibiting their destruction contrary to regulations which the Department of Agriculture was authorized to adopt to give effect to the Act. The endeavor to enforce the Act at once brought its constitutionality into issue, and two state supreme courts and two lower federal courts during 1914 and 1915 held the Act unconstitutional.[2] An appeal from one of the federal decisions, the *Shauver* case, was carried to the United States Supreme Court, where it was twice argued. On the first argument, before a bench of only six judges, there was evidently a division of opinion making a decision favorable to the Act impossible, or else the case seemed sufficiently important to induce the Court to order it re-argued before a full bench. After the re-argument early in 1916 the Department of Agriculture, apparently fearing an adverse decision, evidently hastened to urge upon the Department of State the necessity of concluding a treaty with Canada protecting migratory birds, and within a short time, on August 16, 1916, a treaty covering much the same ground as the Act of 1913 was concluded.[3] The Supreme Court never decided the *Shauver* case. On July 3, 1918, Congress enacted the Migratory Birds Treaty Act[4] to carry further into effect the treaty of 1916 and under it the Department of Agriculture has from time to time issued enforcing regulations. The constitutionality of the Act of 1918 having again been contested on its enforcement, four federal courts, including the district court for the Eastern Arkansas District which had held the 1913 Act unconstitutional, have now uniformly held the 1918 Act constitutional.[5] Thus, the interposition of an underlying treaty has saved federal legislation, otherwise manifestly unconstitutional, from nullity.

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[1] 37 Stat. L. 847.

[2] *United States v. Shauver* (1914, E. D. Ark.) 214 Fed. 154 (opinion by Judge Trieber); *United States v. McCullagh* (1915, Kan. 1st) 221 Fed. 288; *State v. Sawyer* (1915) 113 Me. 458, 94 Atl. 886; L. R. A. 1915F 1031, note; *State v. McCullagh* (1915) 96 Kan. 786, 153 Pac. 557. The Act was upheld in an unreported decision of a federal district court in South Dakota, mentioned in 17 DOCKET, 1476.

[3] 39 Stat. L. 1702.

[4] 40 Stat. L. 755.

[5] *United States v. Thompson* (1919, E. D. Ark.) 258 Fed. 257 (opinion by Judge Trieber); *United States v. Samples* (1919, W. D. Mo.) 258 Fed. 479; *United States v. Selkirk* (1919, S. D. Texas) 258 Fed. 775; *United States v. Rockefeller* (1919, D. Mont.) 260 Fed. 346.

The general recognition, by the courts construing the original Act, that the protection of migratory birds so essential to agriculture was an eminently useful and desirable federal function, physically impossible of adequate performance by the states, did not prevent them from holding practically uniformly that there was no authority in the federal Constitution, express or implied, to sustain such an assumption of federal legislative power. Able and ingenious arguments failed to convince. The statutory declaration that the birds were within the "custody and protection of the government of the United States" and therefore "property of the United States" within the meaning of Article 4, section 3, paragraph 2 of the Constitution conferring on Congress power to make all needful rules "respecting the territory or other property belonging to the United States" (erroneously denominated by two of the courts as the "general welfare" clause) was opposed by the opinion of the United States Supreme Court in *Geer v. Connecticut*[6] and other cases to the effect that wild game in a state, at common law, belonged to the sovereign, which in this country means, to the people of the state, for whom the state is the trustee. True, when the *Geer* case was decided, no theory of divided ownership between state and federal government was in contemplation. The attempt to sustain the original Act under the commerce clause which had successfully supported federal legislation in prohibition of white slavery,[7] lottery tickets,[8] impure foods and drugs,[9] and the liquor traffic,[10] was met by the assertion that such commerce or migration was always the result of human agency, and even more squarely by the *Geer* decision that the power of the state was not terminated by the act of an individual in reducing the game to possession, but that the state could control its disposition so as to prevent its coming under the protection and control of the commerce clause.[11] Incidentally, the exercise of a federal police power as an implied power, while admitted, was held necessarily to attach to some grant of express power, and the

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[6] (1896) 161 U. S. 519, 16 Sup. Ct. 600. See also *Silz v. Hesterberg* (1908) 211 U. S. 31, 29 Sup. Ct. 10; *Patsone v. United States* (1914) 232 U. S. 138, 34 Sup. Ct. 281.

[7] Act of June 25, 1910, 36 Stat. L. 825; *Hoke v. United States* (1913) 227 U. S. 308, 33 Sup. Ct. 281.

[8] Act of March 2, 1895, 28 Stat. L. 963; *Champion v. Ames, Lottery Case* (1903) 188 U. S. 321, 23 Sup. Ct. 321.

[9] Act of June 30, 1906, 34 Stat. L. 768; *Seven Cases v. United States* (1916) 239 U. S. 510, 36 Sup. Ct. 190.

[10] Act of March 1, 1913, 37 Stat. L. 699; *Clarke Distilling Co. v. Western Maryland Ry. Co.* (1917) 242 U. S. 311, 37 Sup. Ct. 180.

[11] As a constitutional argument, this reason is not altogether convincing, for Congress may exercise power over numerous objects of state "ownership," such as forests, waters, etc. *Georgia v. Tennessee Copper Co.* (1907) 206 U. S. 230, 27 Sup. Ct. 618; *Hudson County Water Co. v. McCarter* (1908) 209 U. S. 349, 28 Sup. Ct. 529.

police power over the taking of birds was deemed to vest solely in the states.[12] Other arguments were employed: e. g., that the federal power over navigable waters required the preservation of forests, and that the protection of migratory birds which attacked destructive insect life was necessary and proper to this end; that the protection of the national forests alone sustained the legislation; that "property" in the state does not exclude federal "ownership" or control, any more than such ownership would be excluded in a new island arising within the three-mile limit of a state; that there is some kind of "title" in the expectancy that the birds will normally come into the country or state which justifies repressive measures in distant states against those impairing this normal ingress, in analogy to the riparian owner's interest in preventing abnormal interference by upper owners with the fish coming down the stream.

These arguments being apparently insufficient to convince the majority of the United States Supreme Court, federal legislation for the protection of migratory birds, it seemed, would have to rely upon a constitutional amendment or upon a treaty. A treaty with Canada was, therefore, promptly concluded and in so far as it was not self-executing, the Act of July 3, 1918 and regulations thereunder were designed to carry it into effect. The argument of the defendants, prosecuted for violation of the Act,[13] rested principally on the assumption that the want of power to enact federal legislation on the subject likewise operated to invalidate the treaty. The misconception was promptly dispelled. An able opinion by Judge Trieber sustaining the Act in the *Thompson* case[14] is based on unassailable authority. While the Constitution limits the power of Congress to laws "made in pursuance of" the Constitution, the power over treaties is seemingly not so limited, for Article 6, clause 2 merely provides that "all treaties made, or which shall be made, *under the authority of the United States,* shall be the supreme law of the land." This does not necessarily mean that the treaty-making power is without limitation, but it does probably mean that any matter properly the subject of negotiation with a foreign government is within its scope. How far its subject-matter is limited, if at all, by the Constitution, is exceedingly doubtful. Mr. Justice Field in a celebrated *dictum* in *Geofroy v. Riggs* said that it was

"unlimited, except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to

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[12] See also Brewer, J. in *Kansas v. Colorado* (1906) 206 U. S. 46, 89, 27 Sup. Ct. 655.

[13] See note 5, *supra.*

[14] (1919. E. D. Ark.) 258 Fed. 257.

authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent."[15]

It might well be contended, however, that a compulsory cession of state territory as the result of a disastrous war would not be invalidated by the absence of a state's consent. Thus far no treaty has been held unconstitutional. Probably, we could never plead constitutional disability against a foreign government unwilling to release us from a treaty obligation, unless that government could be charged with knowledge of the disability, a circumstance hardly conceivable if we actually concluded the treaty. Certainly, no subsequent change of constitution can impair the validity or operation of a treaty duly concluded or of an international obligation apart from treaty.[16]

The supremacy of treaties in our law, both constitutional and international, has been amply demonstrated on numerous occasions. Since the early case of *Ware v. Hylton*,[17] in which the Treaty of Peace of 1783, empowering British creditors to recover their American debts, was held to render inoperative a Virginia statute of 1777 confiscating such debts, there has never been any doubt that the federal government, under the treaty-making power, could take out of the control of the states matters otherwise solely within the jurisdiction of state legislation. That power has been exercised with reference to the ownership and devolution of real estate, state statutes of limitation, the removal of disabilities and discriminations against aliens by way of taxation, engagement in certain occupations, such as fishing, residence in particular places, suit by non-resident aliens under state statutes granting an action for injuries causing death, consular administration of alien decedents' estates and many other subjects.[18] Even as to federal legislation, the treaty is supreme so far as applicable. This

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[15] (1890) 133 U. S. 258, 267, 10 Sup. Ct. 295, 297.

[16] The current dispute with Mexico is in part based upon the alleged incompatibility between article 27 of the Mexican constitution and Mexico's international obligations with respect to American citizens. See also, Borchard, *Diplomatic Protection of Citizens Abroad* (1915) secs. 390ff.

[17] (1796, U. S.) 3 Dallas, 199.

[18] The treaties and cases are discussed by Crandall, *Treaties, Their Making and Enforcement*, (2d ed. 1916) secs. 105-109. See also the Treaty with Italy, Feb. 25, 1913, *Malloy's Treaties, Charles' Supplement* (1913) 442, nullifying with respect to Italian subjects the effect of a Pennsylvania statute upheld by the Supreme Court in *Maiorano v. Baltimore & Ohio R. R.* (1909) 213 U. S. 268, 272, 29 Sup. Ct. 424. See also *United States v. Thompson, supra*, 220ff. While the advocates of "States rights" like Mr. Henry St. George Tucker contend that such treaties merely change the status of the alien with respect to the law of the state rather than suspend the operation of the state law, it is hardly doubtful that to the extent of the exercise of the treaty-power such legislation becomes automatically inoperative. Tucker, *Limitations on the Treaty-Making Power* (1915) 143ff.

was illustrated recently when a Spanish declarant, held for evasion of the Selective Draft Act of 1917, claimed exemption from military service under the prior treaty of 1903 between the United States and Spain. Although the courts had to hold the later statute controlling,[19] the President, on a representation from the Spanish Ambassador, recognized the superior binding character of the treaty by ordering the Spaniard's release from the service.[20]

It is within the power of the federal government by treaty to remove from state control any matter which may become the subject of negotiation with a foreign government. With the continued drawing together of the world by increased facilities for travel and communication, the subjects of common interest which require international regulation will continue to grow in extent and variety. Uniformity of legislation by withdrawal from state legislative control of such subjects as marriage and divorce, labor legislation, the ownership and inheritance of property, and all matters affecting aliens would be possible by the exertion of the necessary federal treaty power. That it has not been more indiscriminately exercised is due to the unwillingness of the Department of State, or lack of confidence in the disposition of the Senate, to interfere unnecessarily with state control and thus bring about undesirable political controversy. The advances of foreign governments looking to the conclusion of treaties on particular subjects such as corporation law, the ownership of real estate, etc., now ordinarily controlled by state legislation have, therefore, usually been rejected on the ground that it would be inexpedient for the federal government to remove such matters from state control. It would not have been difficult as a matter of law to settle the Japanese land controversy in California in 1913, had it not been otherwise adjusted, by the conclusion of a treaty nullifying the obnoxious law (assuming two-thirds of the Senate would have concurred), but politically it would not have been wise to antagonize the people of the Pacific coast. And yet, while the treaty-making power confers many rights on aliens, the fact that the enforcement of those rights is so often within the jurisdiction of the states, over whom the federal government has no effective control, has compelled this government on numerous occasions to pay heavy indemnities to foreign governments by reason of its inability to enforce the promises of protection, etc., made in its treaties. This embarrassing situation should be remedied by the enactment of legislation enabling the federal government to enforce the treaty rights of aliens in the federal courts.

E. M. B.

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[19] *Cherokee Tobacco Cases* (1870, U. S.) 11 Wall. 616; *Head Money Cases* (1884) 112 U. S. 580, 598, 5 Sup. Ct. 247.

[20] *Ex parte Larrucea* (1917, S. D. Cal.) 249 Fed. 981, (1918) 28 YALE LAW JOURNAL, 83.

RES JUDICATAE

Privacy and the movies—civilization advances, and new problems confront the courts. The lady-plaintiff (if language may take cognizance of sex-distinctions) in *Humiston v. Universal Film Mfg. Co.* (1919, App. Div.) 178 N. Y. Supp. 752, was the lawyer who solved the Ruth Cruger murder mystery. In consequence, her picture and name were featured by the daily press, and the defendant company incorporated both into one of its weekly news reels of motion pictures, the picture being a truthful filming of the plaintiff when actually engaged in a part of her work on the case. It will be remembered that New York, immediately after the Court of Appeals had decided that there was no right of privacy,[1] passed a statute prohibiting the use of a person's name or picture, without his written consent "for advertising purposes or for purposes of trade"; making such use a misdemeanor, and granting the party injured remedy by injunction and by action for damages, in certain cases even exemplary.[2] Under this statute the plaintiff now sued, for an injunction and for damages, complaining of the use of her picture and name among the news items of the defendant's film weekly, as well as on the billboards in front of the theatre at which the weekly was shown. The complaint was dismissed. The court's discussion comes down, at bottom, to a paradox: the statute went so far that it simply could not be held to go so far. If the statute had provided simply for civil rights in aggrieved parties, it might bear the construction the plaintiff put on it; but the misdemeanor provision, under such a construction, would make a crime of exhibition of the picture of any public gathering unless written consent were secured from every identifiable person in the picture. The court did not feel it proper to make the language of the statute produce such a result.

The opinion drew a sound distinction between movies purveying fiction and those purveying news,[3] reaching the conclusion that the use of accurate names and pictures in current issues of a news film did not fall under "purposes of trade" within the meaning of the statute, any more than would such use in the current daily papers.

On the question whether the use of the name and picture of the plaintiff in exhibits before the theatre was not a use "for advertising purposes" there is more room for difference of opinion. It would seem, indeed, that an advertisement may be so incorporated into the news organ itself, as to become a permissible part of it; if, for instance, the name and picture of the plaintiff were used as the leading feature of a table of contents on the cover of a weekly, the obvious

[1] *Roberson v. Rochester Folding Box Co.* (1902) 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478.

[2] Civil Rights Law, secs. 50, 51.

[3] Thus distinguishing *Binns v. Vitagraph Co.* (1913) 210 N. Y. 51, 103 N. E. 1108, L. R. A. 1915C 839, Ann. Cas. 1915B 1024.

object of the get-up being to induce people passing news-stands to buy and read the paper. Exhibits in the lobby of a motion-picture theatre may fairly be likened to such a cover, so far as they present the films actually running at the time, as apparently in the instant case. But suppose their purpose is to announce the program of the coming week; or that the posters are put on billboards not fairly within the theatre-entrance. Suppose a newspaper on Thursday runs a display of the picture and name of a plaintiff, with the announcement that his whole story, illustrated, will appear in the Sunday issue. There would seem to be much to be said in favor of the view of the two dissenting judges who would have made the statute applicable so far as regarded the poster advertisements.

Poole v. Perkins (1919, Va.) 101 S. E. 240, is a case full of interest for the theory and practice of the conflict of laws. A man and his wife, resident and domiciled in Bristol, Tenn., executed and delivered there a joint promissory note; but the note was payable at a bank across the line in Bristol, Va. By the then law of Tennessee—since changed—the note of a married woman could not be enforced over her plea of coverture. Suit was brought in Virginia, after the makers had become resident and domiciled in Bristol in that state; under Virginia local law there was no incapacity. Recovery was allowed. The reasoning of the court was notably full and able.

It is established by the cases that incapacity for coverture imposed by the *lex domicilii* is a purely local protection covering only locally made contracts and suits in local courts; that a contract otherwise valid, if "made" in a state where women have capacity, is valid everywhere, save where the policy of the forum forbids its enforcing such contracts; and that this holds true even where the contracting married woman remained physically in the state of her domicile, and only "made" the contract in another state by agent or by letter.[4] The conclusion generally drawn is that the place of entering into the contract governs capacity to make commercial contracts, as it does in this country capacity to contract marriage. The principal case, dealing with a contract made in the state of domicile, now aligns itself with those minority decisions[5] and *dicta* which treat the law of the place of performance as, in the absence of other indication, the law intended by the parties to govern the contract; which give legal effect to that intention; *and which subject to that law not merely questions of validity and interpretation, but the determination of capacity to contract as well.*[6] This illustrates anew the marked tendency of our courts to

[4] (1918) *27* YALE LAW JOURNAL, 816.

[5] *Ibid.*, 818, notes 7, 8; most of them are cited in the opinion.

[6] There remains the possibility that *form* may be governed by the law of the place of making. The court in the instant case expressly avoids passing on that.

find a single law to govern all aspects of any one transaction; from that angle alone the decision is worth note. But its striking feature is found in the direct challenge of its reasoning to the territorial theory on which most of our discussion of conflict of laws has been based.

It has been repeatedly demonstrated that to subject the question of capacity to the intention of the parties is incompatible with any theory of territorial validity of law.[7] Capacity involves a person's legal power to *have* an intention which is legally effective. Capacity must therefore be conferred by *some* system of law, before the *intention* to subject the contract to the law of the place of performance can become legally operative. But if a married woman domiciled in Tennessee, and concluding her contract within Tennessee's borders, can project herself by mere intention into capacity in Virginia; and if, as we may fairly assume, the courts of Tennessee would not recognize such capacity in a suit on the contract brought against her in Tennessee—then she is deriving her capacity from a law with which she has no personal or territorial connection. If the law of Virginia is operating to give her that capacity, it is operating outside Virginia's borders, on a person not shown ever to have been in Virginia or "subject to Virginia law" up to the time of contracting. And when the courts of Virginia enforce the contract against her, as they have, it must be because *they* accord her the capacity, even while she is in Tennessee, to bind herself contractually by acts done in Tennessee.[8]

The JOURNAL has taken the position, and sees little reason to depart therefrom, that there are good reasons in policy for choosing the place of making to govern capacity to make a commercial contract.[9] Those

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[7] (1918) 27 YALE LAW JOURNAL, 818; Parmelee in 26 L. R. A. (N. S.) 764 and L. R. A. 1916 A 1058; Lorenzen, *Conflict of Laws Relating to Bills and Notes* (1919) 72. *Cf.* the admirable statement of territorial theory quoted in the opinion from Minor, *Conflict of Laws* (1901) 410:

"The only law that can operate to create a contract is the law of the place where the contract is entered into (*lex celebrationis*). *If the parties enter into an agreement in a particular state, the law of that state alone can determine whether a contract has been made.* If by the law of that state no contract has been made there is no contract. *Hence, if by the lex celebrationis the parties are incapable of making a binding contract, there is no contract upon which the law of any other state can operate.* It is void ab initio."

[8] The careful reasoning of the Virginia court would lead to the same result, if the place of performance selected by the defendant had been New York; and it is believed that the same result would have been reached in such a case. To be sure, the general principles laid down are sharply weakened, as in so many conflict cases, by the fact that they lead squarely—as so often in the "intention" cases—to the application of the forum's local law. Only a decision in which the forum rejects its own local law has full value as a precedent. But while this may weaken the case as an authority for the contract doctrine involved, it does not impair its cogency as an illustration of the inadequacy of the territorial theory to explain the facts.

[9] *Loc. cit.*, 817.

reasons apply, indeed, much less forcibly, if at all, to contracts made by correspondence, where the place of "making" is largely dependent on chance. And if a woman can secure herself contractual capacity by merely posting a letter or sending an agent into another jurisdiction, there is little cause to refuse her power to accomplish the same result by writing into the contract a properly chosen place of performance. This the principal case well brings out. Perhaps the most commercially advantageous solution would be an alternative rule: if one has capacity either by the law of the making or by the law of the performance, the contract is good in that particular.[10] But whichever of these rules be favored, the instant case retains its vital significance. It can be explained in one way only: by recognition that it is the forum which picks the system of law which is to govern a given incident of a transaction, and which thereby incorporates the local rule of that system into itself, as its own rule for the transaction at bar, thus at bottom applying in every case its own law to rights of its own creation.

But one does not have to resort to the conflict of laws to find that married women are a source of trouble—at least to lawyers. The process of freeing them from the disabilities of coverture is still slowed down by an occasional monkey-wrench in the machinery. In Ohio, for instance, the legislature passed an act in 1887. It provided (General Code, section 7999) that "a husband and wife may enter into any engagement or transaction with the other, or with any other person, *which either might if unmarried* . . ." and further, (section 8000) that "a husband and wife *cannot by any contract with each other alter their legal relations,* except that they may agree to an immediate separation." Some twenty years later an agreement was executed in due form, in which a certain wife in consideration of five promissory notes given her by her husband released all dower rights in his estate. On her predeceasing him, her administrator brought suit on the notes—and failed to recover. *Du Bois v. Coen* (1919, Oh.) 125 N. E. 121. A divided court found that the use of the word *legal,* rather than *marital* relations in the provision above quoted, showed that the legislature intended "that there should be no alteration either of marital or of property relations in the nature of expectancies, except in the case of immediate separation." It is difficult to understand this niggardly restriction of "legal relations" to expectancies; if no judicial notice is to be taken of common sense, why not give "legal" its full meaning, let section 8000 wholly nullify section 7999, and be done with it? The present interpretation is an invitation

[10] *Cf.* Lorenzen, *op. cit.,* 80; *Dulin v. McCaw* (1894) W. Va. 721, 20 S. E. 681; Wharton, *Conflict of Laws* (3d ed. 1905) secs. 102, 104.

to further litigation. On the other hand, the court overlooks an argument of ponderous import: section 7999 in itself never did give power to husband and wife to contract for release of either's dower interest: is a release of dower interest a transaction "which either might enter into if unmarried"?

Nonetheless, Married Woman's Property Acts do have their effect. A plaintiff was being driven by her husband in his car; his negligence and that of the defendant street-car company combined to bring about a collision in which the plaintiff was injured. When she sued, the company sought to identify her with her husband's contributory negligence. It was very properly held that since the Act he no longer had any interest in her cause of action, and that she might recover although his negligence was one contributing cause. *Brooks v. British Columbia Electric Ry.* (1919, B. C.) 3 West. Weekly Rep. 109. Which raises the question: how if she had elected to sue *him* as one of the joint tort-feasors? On this the courts are, as is known, by no means agreed.[11] But some have taken the sane position vigorously: "If she may sue him for a broken promise, why may she not sue him for a broken arm?"[12]

Another reminder that the law of contributory negligence is being radically rewritten comes from the Supreme Court in *Chicago, Rock Island and Pacific Ry. v. Cole* (December 8, 1919) October Term, 1919, No. 290. The plaintiff sued for the death of her intestate, who had been killed by a train approaching in full view. "If the question were open for a ruling of law, it would be ruled that the plaintiff could not recover. But the Oklahoma Constitution provides that 'the defence of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury.'"[13] The jury had found for the plaintiff. The argument that the company had a vested right to the defence was "disposed of by the decisions that it may be taken away altogether. . . . It is said that legislation cannot change the standard of conduct, which is matter of law in its nature into matter of fact, and this may be conceded; but the material element in the constitutional enactment is not that it called the contributory negligence fact, but that it left it wholly to the jury. There is nothing, however, in the Constitution of the United States or its Amendments that requires a State to maintain the line with which we are familiar between the functions of the jury and those of the court."

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[11] (1918) 27 YALE LAW JOURNAL, 1081. *Cf.* also *Coffinbarger v. Coffinbarger* (1918, Ky.) 203 S. W. 533.

[12] *Brown v. Brown* (1914) 88 Conn. 42, 46, 89 Atl. 889, 891.

[13] *Cf.* the Arizona statute described in *Arizona Copper Co. v. Hammer* (1919) 30 Sup. Ct. 553, (1919) 29 YALE LAW JOURNAL, 225.